delivery of a telegram advising him of her arrival there at a scheduled hour, and the terror which ensued during a lonely ride at midnight to her home.

Recovery has also been allowed for mental pain resulting from the mutilation of a dead body;[18] from the breach of contract to carry a dead body safely, where such breach constituted a wilful tort;[19] and from the breach of contract of an undertaker to keep safely the body of a dead child.[20] The Supreme Court of Minnesota, however, has recently refused a recovery for mental distress where a railroad company negligently failed to carry a dead body to its destination according to the usual train schedule, the delay interfering with the funeral plans and causing anxiety, humiliation and other anguish of mind.[21] The case holds that the facts establish a breach of contract only, and in the absence of a wilful tort incident to such breach, mental suffering is not an element of damage. It would seem to be in exact accord with the general rule, and commends itself to the legal mind as a sound view of the question involved. The subject is thoroughly reviewed, and the authorities fully stated, in the opinion of the Court.

The Scope of the Remedy of Discovery.

The usefulness of a bill of discovery in eliciting evidence to forward the ends of justice and render more difficult the successful perpetration of fraud is illustrated in a case recently decided by the United States Circuit Court for the District of Kansas. The case is that of the *Mutual Life Insurance Company of New York v. Griesa et al.*, 156 Fed. 398. One Perkins, who had taken out a policy with the complainant company for $100,000, in addition to several other policies aggregating nearly a million dollars with other companies, had been killed by accidentally falling from the roof of his house, shortly after having paid the first premium on the policy. The circumstances accompanying the accident were highly suspicious, pointing to a deliberate suicide; indeed, the coroner thought that such was the case. Perkins had purchased mor-

---

[18] *Larson* v. *Chase*, 47 Minn., 307 (1891).
[19] *Lindh* v. *Railway Co.*, 99 Minn., 408 (1906).
[20] *Reinhan* v. *Wright*, 125 Ind., 536 (1890).
[21] *Beaulieu* v. *Great Northern Ry. Co., supra.*

phine the day of his death; his eyes showed effects of morphine poisoning; and the doctor who examined him hinted at such a cause. He was, however, buried without any examination having been made on the part of the insurance companies. There was a clause in complainant's policy which prevented recovery if death occurred through suicide within two years from the payment of the first premium; a clause to which Perkins had strongly objected, but which he had finally accepted under protest. When action was brought against the complainant for the insurance, this bill was filed petitioning the court to grant an order to have the corpse exhumed and examined by physicians for traces of morphine poisoning. Mr. Justice McPherson granted the order, reviewing the authorities with care, and announcing that in such a case, where the ends of justice required it, and where a possible fraud was to be guarded against, no questions of delicacy should enter into the case; adding dryly that such arguments certainly would not have been advanced had it been necessary to take such a proceeding for the executor to obtain the money.

The case is a novel one in the length to which it goes, though by no means and illogical conclusion, considering the development of the usefulness of this form of relief during the past century. Originally, as is well known, the bill of discovery lay only when books or documents material to the cause were wholly in the control of one of the parties, and the other could show the court that the evidence they contained was a necessary link in the framing of his action.[1]

There soon arose analogous cases, however, in which this form of producing evidence was the only adequate one. "In chancery, under the same wholesome principle and practice by which bills of discovery were allowed for ascertaining the opponent's testimony and the documents in his possession, the inspection of chattels and premises in his possession or control was obtainable wherever fairness seemed to demand it."[2] Hence we find Lord Eldon allowing the bill in 1815, where an injunction was asked for to restrain the infringement of a patent, and the inspection desired was of the machine in which the alleged piracy was worked out;[3] and again, in 1819, in the case of *Kynaston* v. *The East India Co.*, 3 Swanston 248, where the petition asked for an order of inspection of certain houses

---

[1] Pomeroy, Equity Jurisprudence, Sec. 191.

[2] 3 Wigmore's Evidence, Sec. 1862.

[3] *Bovill v. Moore*, 2 Cooper's Chan. cases 56 (1815).

in order to determine the value of the titles to which the plaintiff was entitled.

The examination has been most frequently allowed, both in England and the United States, in mining cases, where there was a dispute as to the boundary, or as to the amount of mineral extracted from the plaintiff's mine by the adjoining owner, and a survey was desired.[4] In *Reynolds* v. *Burgess Sulphite Fibre Co.*, 71 N. H. 332 (1902), Judge Chase, of the Supreme Court of New Hampshire, in a well-reasoned opinion, allows the bill where an inspection of a machine is asked by the administratrix of a workman who was killed by reason of a defect in it, the principal action being one in tort for the death. Cases in some jurisdictions have gone the other way, notably in New York,[5] where the Code Practice seems to be an obstacle, and in Michigan,[6] where the order was refused; in each case, however, upon some other than the jurisdictional ground. But the general law in this country, as well as in England, seems to be that a bill of discovery will be allowed where the evidence sought is contained in property within the defendant's control, whether that property be books, documents, chattels or real estate. All that the plaintiff need show is a definite interest, an interest which, in the language of Story (Equity Jurisprudence, Sec. 1493a) "will, if he is plaintiff at law, constitute a good ground of action, or, if he is the defendant at law, show a good ground of defense, in aid of which the discovery is sought." And in cases of doubt, he adds, the court will grant the discovery, and leave the court of law to adjudicate upon the legal rights of the parties.

There is considerable conflict as to whether discovery should be allowed in one class of cases: those in which it is sought to compel a witness to permit his person to be examined, in order to determine the extent of an injury. The Supreme Court of the United States, in *Union Pacific R. R.* v. *Botsford*, 141 U. S., 250 (1890), refused to grant such an order, holding it a violation of the natural right of every man to the inviolability of his person," though later, in a case brought in a jurisdiction where a statute provided for such examination, they admitted that the Federal Courts should recognize the

---

[4] *Henszey* v. *Langdon-Henszey Coal Min. Co.*, 80 Fed. 178 (1897); *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Mass. 80 (1869); *Thomas Iron Co.* v. *Allentown Mining Co.*, 28 N. J., Eq. 77 (1877).

[5] *Ansen* v. *Tuska*, 1 Robertson (N. Y), 663 (1863).

[6] *Newberry* v. *Carpenter*, 31 L. R. A. 163 (1895); *Martin* v. *Elliott*, 31 L. R. A. 169 (1895).

statute.[7] The very existence of such legislation would indicate that the tendency of the law is to compel a party to submit to such inspection, or else forfeit his right to the benefit of the law, and such seems to be the case.[8]

The writer has succeeded in finding only one other case in which the bill was brought for the same purpose as in the *Insurance Co.* v. *Griesa.* That is the case of the *Grangers' Life Insurance Co.* v. *Brown,* 57 Miss. 308 (1829), in which the court refused the order on the ground that the facts were not strong enough to warrant it. "We are not prepared to say," the opinion reads, "that in a proper case the court, in the interests of justice, should not compel the exhuming and examination of a dead body which is under the control of the plaintiff, if there is a strong reason to believe that without such examination a fraud is likely to be accomplished, and the defendant has exhausted every other method known to the law of exposing it. We are prepared to say, however, that such an order should be made only upon a strong showing to that effect."

Under the facts as shown in the report there was as much reason to grant the bill here as in the Griesa case, and the failure of the court to do so can only be explained by the fact, as shown by the portion of the opinion quoted, that the principle that discovery may be cumulative is not recognized.

It is true that there was a time when the auxiliary bill of discovery was constantly and often needlessly presented, as an easy means of obtaining valuable evidence, and hence the United States Supreme Court decision in *Brown* v. *Swann,* 10 Peters, 497 (1836), denying the bill where the facts may be proved in any other way. But the practice has changed so materially that this rule is no longer necessary, and *Brown* v. *Swann* may be said not to represent the general law.[9] Discovery will not be refused because the same facts can be proved by other testimony, but discovery will be granted in order to confirm or even to dispense with such other proofs.[10]

The authorities seems to present no valid reason why such a case as this should not have been decided long ago. Indeed,

---

[7] *Camden & Suburban Ry. Co.* v. *Stetson,* 177 U. S. 172 (1899).

[8] *Dimenstein* v. *Reichelson,* 34 W. N. C. (Pa.) 295 (1903); *Graves* v. *Battle Creek,* 95 Mich. 266.

[9] *Earl of Glengall* v. *Frazer,* 2 Hare, 99; *Peck* v. *Ashley,* 10 Met. (Mass.) 478; *Vance* v. *Andrews,* 2 Barb. Ch. (N. Y.), 370, 2 Story Equity, Sec. 1483. Pomeroy, Equity Sec. 196.

[10] Merwin, Equity and Equity Pleading, Sec. 854.

aside from the question of delicacy, which has doubtless oftentimes stopped the proceeding in its inception, the grounds for denying the bill are slighter here than elsewhere, for such refusal is most frequently based on the argument that to grant discovery would be to violate a property right, and no one has a property right in a buried corpse.[11] The decision is an interesting one, particularly in the light of the recent proceedings in England in the matter of the Druce succession.

---

[11] 2 Blackstones' Commentaries, 429.